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CHASE PERDANA BHD

v.

MD AFENDI HAMDAN

B HIGH COURT SABAH & SARAWAK, KOTA KINABALU
LINTON ALBERT J
[SUIT NO: K22-126-1998]
9 NOVEMBER 2005

C ***CONTRACT:*** *Shares, sale and transfer of - Sale and purchase agreement - Proposal rejected by Ministry of Finance - Plaintiff commenced action for refund of RM1 million - Whether plaintiff was in breach of the condition precedent requiring it to make application to Ministry of Finance for approval - Whether defendant established its* D *counterclaim on a balance of probabilities*

On 5 December 1996, the Ministry of Finance had given the requisite approval allowing one Jernih Kaya Sdn Bhd ('Jernih') and Yayasan Bumiputra Sabah ('Yayasan') to jointly set up a stockbroking firm. The stockbroking firm, First Securities Sdn Bhd E ('First Securities') was incorporated and wholly owned by a holding company, Dioncorp ('Dioncorp'). With the approval of the Ministry of Finance, Yayasan held 51% of the equity in Dioncorp while Jernih held 49%. The defendant held 240 out of the 1000 alloted paid shares in Jernih. The plaintiff, a public listed company F in the then Kuala Lumpur Stock Exchange, came into the picture through its executive chairman and director PW1. The defendant was introduced to PW1 by PW2, the executive chairman of Yayasan which resulted in the negotiations between the defendant and PW1 for the sale of all the defendant's 240 shares in Jernih G to facilitate a backdoor acquisition by the plaintiff of an interest in the stockbroking business of First Securities. The contract which was formed as a result of the negotiations was for the transfer of the defendant's 240 shares in Jernih to one Madrigal Bin Gumba ('MG'), the purchaser appointed by the plaintiff to buy the H defendant's 240 shares in consideration for which the plaintiff would pay the defendant the sum of RM5 million. On 26 June 1997, MG and the plaintiff executed a sale and purchase agreement for the sale and transfer of 510 out of the 900 shares held by MG in Jernih to the plaintiff representing 51% of Jernih's I total shareholding for a sum of RM4.4 million. On the same day, MG sought the approval of the Ministry of Finance for the aforesaid sale to the plaintiff but the proposal was rejected by the

said Ministry some six months later. Hence, this action for the refund of the RM1 million paid by the plaintiff to the defendant. The defendant, however, counterclaimed and submitted that there was an oral contract between the defendant and the plaintiff for the sale of his 240 shares in Jernih to MG for RM5 million which was to be paid by the plaintiff to the defendant; RM1 million was to be paid upon execution of the transfer of the said 240 shares in Jernih to MG and the balance of the RM4 million upon acquisition of 51% of Jernih's issued paid up ordinary shares.

Held (dismissing plaintiff's action):

(1) The plaintiff herein was caught by the rule that a right does not arise from a wrong – *jus ex in juria non oritur*. This was because the plaintiff sought to exercise its right to a refund of the deposit of RM1 million paid to the defendant by relying on the non-approval of its sale and purchase agreement with MG by the Ministry of Finance without first fulfilling its own contractual obligation under cl. 5 of the sale and purchase agreement requiring the plaintiff to apply for the approval which it did not. (para 6)

(2) The plaintiff ought to be precluded from relying on a condition subsequent which entitled the plaintiff to a refund of RM1 million deposit upon non-approval by the Ministry of Finance where it was established that the plaintiff was in breach of the condition precedent requiring the plaintiff to make the application to the Ministry of Finance for approval of the sale and purchase agreement for its purchase of the 51% shareholding in Jernih from MG. (para 7)

(3) As to the defendant's counterclaim, the tenor of the letter of undertaking to the effect that the defendant at the plaintiff's request 'having agreed to transfer' his shares to MG, viewed together with the relevant circumstances of the plaintiff's contemporaneous acts, deeds and omissions irresistibly suggested that there was an oral contract between the plaintiff and the defendant, consistent with the defendant's plea. The defendant had established its counterclaim on a balance of probabilities. (paras 11 & 12)

[Allowing defendant's counterclaim in terms of prayers (a) and (c); order accordingly.]

Case(s) referred to:

Maritime National Fish Ltd v. Ocean Trawler Ltd [1935] All ER Rep 86 ***(refd)***

Mc Cutcheon v. David Mac Brayne Ltd [1964] 1 All ER ***(refd)***

National Land Finance Co-Operative Society Ltd v. Sharidal Sdn Bhd [1983] 2 MLJ 211 ***(refd)***

New Zealand Shipping Company Ltd v. Societe Des Ateliers et Chantiers de France [1918]-19] All ER Rep 552 ***(refd)***

Plenitude Holding Sdn Bhd v. Tan Sri Khoo Teck Puat & Anor [1992] 4 CLJ 1882; [1992] 3 CLJ (Rep) 281 HC ***(refd)***

State Taylor Sdn Bhd v. Nallapan [2005] 2 CLJ 167 CA ***(refd)***

Tan Chong & Sons Motor Company Sdn Bhd v. Mc Knight [1983] 1 MLJ 230 ***(refd)***

Tindok Besar Estate Sdn Bhd v. Tinjar Co [1979] 2 MLJ 229 ***(refd)***

For the plaintiff - Christoper Chong; M/s Lind Willie Wong & Chin
For the defendant - Jeyan Marimuttu; M/s J Marimuttu & Partners

Reported by Suhainah Wahiduddin

JUDGMENT

Linton Albert J:

[1] In the heady days of the share market boom, the Ministry of Finance had on 5 December 1996 given the requisite approval which allowed one Jernih Karya Sdn Bhd (Jernih) and Yayasan Bumiputra Sabah to jointly set up a stockbrocking firm in Tawau, Sabah. The Stockbrocking firm, First Securities Sdn Bhd (First Securities) was incorporated and it was wholly owned by a holding company called Dioncorp Sdn Bhd (Dioncorp). With the approval of the Ministry of Finance, Yayasan held 51% of the equity in Dioncorp while Jernih held 49%. The defendant held 240 out of the 1000 allotted paid up shares in Jernih. The plaintiff, a public listed company in the then Kuala Lumpur Stock Exchange came into the picture through its executive chairman and director one Tan Sri Dr. Mohan Swami (PW1) a corporate figure of no mean stature and the linchpin in the contract between the defendant and the plaintiff in respect of the defendant's 240 shares in Jernih. The defendant was introduced to PW1 by Datuk Seri Panglima Mohd. Salleh Tun Said Keruak (PW2), the executive chairman of Yayasan which resulted in the negotiations between the defendant and PW1 for the sale of all the defendant's 240 shares in Jernih to facilitate a backdoor acquisition by the plaintiff of an interest in

the much desired stockbroking business of First Securities. The plaintiff had the wherewithal to obtain the necessary funds to kick-start the stockbroking business. It was envisaged that everyone, the plaintiff, the defendant and Yayasan would stand to gain because back then opportunities abound for much money to be made out of shares dealings and transactions. The contract which was formed as a result of the negotiations between the defendant and PW1 was for the transfer of the defendant's 240 shares in Jernih to one Madrigal bin Gumba (MG), the purchaser appointed by the plaintiff to buy the defendant's 240 shares in consideration for which the plaintiff would pay the defendant the sum of RM5 million. MG was one of the other two shareholders in Jernih and with the transfer of the defendant's shares, MG's shareholding in Jernih would be increased to 900 shares. The plaintiff contends that the contract was reduced into writing under a Letter of Undertaking dated 24 June 1997 upon which the pleaded case was founded. The contents are these:

To: Md. Afendi bin Hamdan
(NRIC: No. 610806-12-5039)
Apt 2-1-11, Hilltop Apartments
Luyang, 88300 Kota Kinabalu
Sabah, Malaysia

Letter Of Undertaking

In Consideration of your having at our request agreed to transfer all your shares in the Company known as Jernih Karya Sdn Bhd (Company No. 306393-X) to Madrigal b. Gumba (Nric No. 600103-12-5615), We hereby agree and undertake to pay to you the sum of Ringgit Malaysia Five Million (RM5,000.000.00) only which sum shall be payable as follows:

1. A deposit of Ringgit Malaysia One Million (RM1,000,000.00) only upon execution and stamping of the following documents:

   a. Sale and Purchase Agreement between Madrigal b. Gumba and Chase Perdana Berhad in respect of the purchase by the latter of a certain number of shares in Jernih Karya Sdn Bhd.

   b. Execution of the Shareholders Agreement between Yayasan Bumiputra Sabah and Chase Perdana Berhad in respect of the joint Venture Investment Company known as Dioncorp Sdn Bhd.

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2. The balance sum of Ringgit Malaysia Four Million (RM4,000,000) only shall be paid upon the approval of the Foreign Investment Committee and any other relevant authorities as may be necessary of the Sale and Purchase agreement between Chase Perdana Berhad and Madrigal b. Gumba described under 1(a) above. The Deposit shall be refundable in the event the approval herein are not obtained within three months from the date hereof.

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Dated this 24 day of June 1997.

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The Common Seal of)
Chase Perdana Berhad)
was hereunto affixed)
in the presence of:)

sgd)
D ...)
Director)

sgd)
...)
Director Secretary)

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[2] On 26 June 1997 MG and the plaintiff executed a sale and purchase agreement for the sale and transfer of 510 out of the 900 shares held by MG in Jernih to the plaintiff representing 51% of Jernih's total shareholding for a sum of RM4.4 million. On the same day MG sought the approval from the Ministry of Finance for the aforesaid sale to the plaintiff but the proposal was rejected by the Ministry of Finance some six months later *vide* a letter dated 12 January 1998. Hence, this action for the refund of the RM1 million paid by the plaintiff to the defendant on 29 June 1997.

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[3] It is patently clear from cl. 1(a) of the Letter of Undertaking that the sale and purchase agreement between MG and the plaintiff must by necessary implication form part of the Letter of Undertaking:

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> If a term is not expressed in a contract, there is only one other way in which it can come into it and that is by implication.

(per Lord Devlin in *Mc Cutcheon v. David Mac Brayne Ltd* [1964] 1 All ER).

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[4] Learned counsel for the plaintiff relied on several authorities to illustrate the effect of non-approval on contracts in circumstances similar to the one relied on by the plaintiff in the instant case. One of them is the Federal Court case of *National Land Finance Cooperative Society Ltd v. Sharidal Sdn Bhd* [1983] 2 MLJ 211 which has been accepted as the standard authority on contracts incorporating requirements of approval such as the one relied on by the plaintiff. Passages in the headnote relevant to the plaintiff's case are reproduced:

> In this case the respondents had agreed to sell and the appellants had agreed to buy certain immoveable property. It was a condition of the agreement that the sale should be subject to the approval of the Foreign Investment Committee. In the event the Foreign Investment Committee refused its approval but suggested that the property be transferred to a joint venture company of which at least 30% of its equity is held by Bumiputras. The respondents contended that the agreement became void when the Foreign Investment Committee refused to approve the sale.
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> Held: (1) the agreement became void because of the refusal of Foreign Investment Committee to approve the sale over which neither the appellants nor the respondents had control ...
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> ... the deposit was refundable as money had and received of the use of the appellants who had paid it.

[5] In my judgment that case was in principle very different from this because neither the appellant nor the respondent was at fault or in breach of their respective obligations under the contract. In the present case the plaintiff was in clear breach of cl. 5 of the sale and purchase agreement between MG and the plaintiff referred to in cl. l(a) of the Letter of Undertaking. Clause 5 states:

> Conditions Precedent
>
> 5.1 Notwithstanding anything to the contrary contained herein the sale and purchase of the Shares is conditional upon the following conditions precedent being fulfilled:
>
> 5.1.1 the approval ("the FIC approval") of the Foreign Investment Committee of the Prime Minister's Department, Malaysia ("the FIC") for the purchase of the Shares being obtained which approval shall be applied for by the Purchaser;

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> 5.1.2 the approval of the Ministry of Finance for to the purchaser of the Shares upon the terms of this Agreement, which approval shall be applied for by the Purchaser;

B **[6]** Surely, in these circumstances, the plaintiff is caught by the rule that a right does not arise from a wrong – *jus ex in juria non oritur*. This is because the plaintiff sought to exercise its right to a refund of the deposit of RM1 million paid to the defendant by relying on the non-approval of its sale and purchase agreement with MG by the Ministry of Finance without first fulfilling its own C contractual obligation under cl. 5 requiring the plaintiff to apply for the approval which it did not. In *New Zealand Shipping Company Ltd v. Societe Des Ateliers Et Chantiers De France* [1918-19] All ER Rep 552 Lord Atkinson said at p 556:

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> ... to permit the blameable party to do either would be to permit him to take advantage of his own wrong, in the one case directly, and in the other case indirectly in a roundabout way, but in either way putting an end to the contract. The application to contracts such as these of the principle that a man shall not be permitted E to take advantage of his own wrong thus necessarily leaves to the blameless party an option whether he will or will not insist on the stipulation that the contract shall be void on the happening of the named event. To deprive him of that option would be but to effectuate the purpose of the blameable party. When this option is left to the blameless party, it is said that the contract is voidable, F but that is only another way of saying that the blameable party cannot himself have the contract made void, cannot force the other party to do so, and cannot deprive the latter of his right to do so.

G **[7]** The fact that MG applied for the approval to the Ministry of Finance on the day he executed the sale and purchase agreement of his 510 shares to the plaintiff is, in my view, indubitably ineffectual and is of no assistance to the plaintiff because it was not even remotely suggested that approval would not have been given had the application been made by the plaintiff H which was its obligation under the sale and purchase agreement with MG who regrettably did not feature in these proceedings and whose precise relationship with the plaintiff and PW1 remains shrouded in mystery. Curiously enough, Maliami bin Hamad (PW4) the Ministry of Finance official who signed the letter dated I 12 January 1998 rejecting the plaintiff's acquisition of MG's 510 shares in Jernih was not asked whether it would have made any

difference if the application was instead made by the plaintiff. Be that as it may, I express no opinion as to how I would have determined this aspect had it been established that it would not have made any difference if the application was made by the plaintiff. To sum up, a party to a contract cannot enforce his strict legal right if it is shown that he is in breach of the contract in not fulfilling an obligation under the contract. Justice and common sense dictate that the plaintiff ought to be precluded from relying on a condition subsequent which entitles the plaintiff to a refund of RM1 million deposit upon non-approval by the Ministry of Finance where it has been clearly established that the plaintiff was in breach of the condition precedent requiring the plaintiff to make the application to the Ministry of Finance for approval of the sale and purchase agreement for its purchase of the 51% shareholding in Jernih from MG. This case confirms what has sometimes been said – that the law can be harsh on careless or ignorant plaintiffs. *Maritime National Fish Ltd v. Ocean Trawler Ltd* [1935] All ER Rep 86 is analogous to this case and is illustrative of the principle I have resorted to for its determination. In that case the appellants operated five trawlers one of which was under a charter-party and belonged to the respondents. There was a regulation requiring licences to operate these trawlers. The appellants applied for five licences but the Minister of Fisheries was prepared only to issue three licences and was given the option to choose which of the five trawlers the appellants desired to have licences. The appellants chose three trawlers other than the trawler under the charter-party and the requisite licences were issued for those three trawlers. The respondents brought an action for hire due under the charter. The appellants denied liability, claiming that the contract had become impossible of performance and that they were wholly discharged from it. The Privy Council held that the appellants were liable under the contract. This was what Lord Wright said at p. 90:

> If it be assumed that the performance of the contract was dependent on a licence being granted, it was that election which prevented performance, and on that assumption it was the appellants' own default which frustrated the adventure. The appellants cannot rely on their own default to excuse them from liability under the contract.

[8] I shall now turn to consider the defendant's counterclaim which was grounded on the averments in the defence and counterclaim and are summarized as follows. There was an oral contract between the defendant and the plaintiff for the sale of his 240 shares in Jernih to MG for RM5 million which was to be paid by the plaintiff to the defendant; RM1 million was to be paid upon execution of the transfer of the said 240 shares in Jernih to MG and the balance of RM4 million upon acquisition of 51% of Jernih's issued paid up ordinary shares. Learned counsel for the defendant relies on these facts which have been indisputably established. Firstly, the defendant transferred his 240 shares to MG on 24 June 1997 and the plaintiff paid the RM1 million deposit and part payment to the defendant on 27 June 1997. This constitutes the plaintiff's total disregard for cl. 1 of the Letter of Undertaking which stipulates that the RM1 million was to be paid upon the execution and stamping of the sale and purchase agreement between the plaintiff and MG and the shareholders agreement between the plaintiff and Yayasan in respect of Dioncorp; the former was executed on 26 June and stamped on 25 July 1997 while the latter was executed on 3 July 1997. Secondly, it was announced by the Plaintiff in several publications particularly the News Straits Times and Business Times that the plaintiff had acquired a 51% stake in Jernih and a controlling interest in Dioncorp; although it does not fall to be considered whether it was appropriate or conscionable for the plaintiff to make such a premature public announcement which resulted in a cute and not insubstantial increase of RM3.40 per share in the plaintiff's shareholding or whether the plaintiff and PW1 directly or indirectly profited from this, the brute fact remained, that the plaintiff treated the conditions relating to the Foreign Investment Committee approval and approval from other relevant authorities under the Letter of Undertaking as totally ineffectual. It defies logic for the plaintiff to defeat the counterclaim by relying on a condition it had treated as inconsequential in the first place. If authority is required for the inevitable conclusion I have arrived at on the basis of the more mundane and obvious matters which are evident here, I need only refer to the statement of the law set out in *Plenitude Holding Sdn Bhd v. Tan Sri Khoo Teck Puat & Anor* [1992] 4 CLJ 1882; [1992] 3 CLJ (Rep) 281 where PS Gill J (as he then was) said:

> Waiver has been defined in the case of *WF Alan & Company Ltd v. El Nasr Export & Import Company* by Lord Denning where at p 140 of the same judgment his Lordship stated:

> The principle of waiver is simply this: if one party, by his conduct, leads another to believe that the strict rights arising under the contract will not be insisted on, intending that the other should act on that belief, and he does act on it, then the first party will not afterwards be allowed to insist on the strict legal rights when it would be inequitable for him to do so: see *Plasticmoda Societa Per Azioni v. Davidsons (Manchester) Ltd* [1952] 1 Lloyd's Rep 527 at p 539. There may be no consideration moving from him who benefits by the waiver. There may be no detriment to him by acting on it. There may be nothing in writing. Nevertheless, the one who waives his strict rights cannot afterwards insist on them. His strict rights are at any rate suspended so long as the waiver lasts. He may on occasion be able to revert to his strict legal rights for the future by giving reasonable notice on that behalf, or otherwise making it plain by his conduct that he will thereafter insist on them: see *Tool Metal Manufacturing Co Ltd v. Tungsten Electric Co Ltd.* [1955] 2 All ER 657; [1955] 1 WLR 761. But there are cases where no withdrawal is possible. It may be too late to withdraw; or it cannot be done without injustice to the other party. In that event he is bound by his waiver. He will not be allowed to revert to his strict legal rights. He can only enforce them subject to the waiver he has made.

[9] One other matter which I need to comment on is the surprise sprung by the plaintiff midway through the trial of this action with the introduction of evidence suggesting that the defendant's shares were never formally transferred to and registered in the name of MG. That may well be the measure of the plaintiff's indolence if it had chosen to mothball crucial documents all these years and is so much the worse for it but the short and simple answer to that, is the well-established rule that a party is bound by its pleadings and here the plaintiff had in para. 6 of its much amended statement of claim categorically and unreservedly averred that the defendant's shares were duly transferred to MG pursuant to the Letter of Undertaking. A definitive expression of this principle which has been consistently and inflexibly applied in civil proceedings can be found in *Halsbury's Laws of Malaysia,* Vol 1 para. 10.3.129, which reads as follows:

> The function of pleadings is to give fair notice of the case which has to be met and to define the issues on which the court will have to adjudicate in order to determine the matters in dispute between the parties. Thus a party is bound by his pleadings

A unless and until they are amended. A plaintiff who at the trial radically departs from his case as pleaded, however, is likely to fail. It follows that the pleadings enable the parties to decide in advance of the trial which evidence will be needed. From the pleadings the appropriate method of trial can be determined. They also form a record which will be available if the issues are sought to be litigated again. The matters in issue are determined by the state of pleadings at their close. (See *State Taylor Sdn Bhd v. Nallapan* [2005] 2 CLJ 167)

[10] Thankfully, but for this as yet immutable rule of procedure, I would have been required to grapple with a host of complex legal issues and go through the testimonies of the protagonists meticulously with a fine-tooth comb to determine the merits of the wide array of arguments advanced by both learned counsel for the plaintiff and the defendant in their very lengthy written submissions. Suffice it to say that the conflicting testimonies can only be resolved by drawing the necessary inferences from the contemporaneous documents and conduct of the plaintiff; these, coupled with the obvious facts I have already referred to lead to the inescapable conclusion that the plaintiff has failed to establish its pleaded case. The approach I have taken is consonant with what was stated by Chang Min Tat, FJ in *Tindok Besar Estate Sdn Bhd v. Tinjar Co* [1979] 2 MLJ 229 at p 234:

> For myself, I would with respect feel somewhat safer to refer to and rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with a purpose of his own to serve and if it did not account for the statements in his documents and writings. Judicial reception of evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case. Plausibility should never be mistaken for veracity.

[11] As to the defendant's counterclaim, the tenor of the Letter of Undertaking to the effect that the defendant at the plaintiff's request "having agreed to transfer" his shares to MG, viewed together with the relevant circumstances of the plaintiff's contemporaneous acts, deeds and omissions irresistibly suggests that there was an oral contract between the plaintiff and the defendant, consistent with the defendant's plea. In *Tan Chong & Sons Motor Company Sdn Bhd v. Mc Knight* [1983] 1 MLJ 230 Salleh Abas, FJ said:

In any event, whether one regards the oral representation as a separate agreement or as an integral part of it or even as a new term, there is no running away from the fact that the oral representation was contradictory to the printed conditions. This conflict did not in any way deter the court from doing justice. By relying on the authority of Devlin J (as he then was) in *Firestone Tyre Rubber Company. Ltd. v. Vokins Ltd.,* the court held that as the importer entered into the contract on the basis of the oral representation, the printed conditions exempting the agent from liability were repugnant to such representation and should therefore be rejected, as otherwise the latter would become completely illusory. Thus by treating the oral representation as having an overriding effect the importer was held to be entitled to damages. It is the need to attach responsibility upon the maker of pre-contract statements that such statements have been given an overriding effect by the court despite their defiance of the terms of a written contract.

[12] I am satisfied, therefore, that on the evidence before me, looked at in its entirety, the defendant has established its counterclaim on a balance of probabilities.

[13] For the reasons I have tried to explain above, the plaintiff's action is dismissed with costs and the defendant's counterclaim in terms of prayers (a) and (c) is allowed also with costs. Order accordingly.